United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-4248

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM GELLER and DORIS GELLER,
Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

ON APPEAL FROM A DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR PETITIONERS-APPELLANTS

IRWIN GELLER
Attorney for Petitioners-
Appellants
130 East 40th St.
New York, New York 10016
(212)532-3850

0

TABLE OF CONTENTS

TABLE OF CITATIONS

A) Court cases:

B) Tax Court Cases:

C)Statutes:

ISSUES PRESENTED

1. Whether the limitations period in Section 6501(a) of the Internal Revenue Code bars the tax deficiency assessments herein by the Commissioner of Internal Revenue, or whether the Commissioner sustained his burden of proof by producing clear and convincing evidence that petitioners filed fraudulent returns for the years in question, thereby removing the statutory bar pursuant to Section 6501(c)(1) of the Code?

a) Whether the Tax Court committed reversible error in bestowing upon the Commissioner's determination that certain deposits were income to petitioners a presumption of correctness instead of requiring the Commissioner to prove this allegation by clear and convincing evidence?

b) Whether the evidence in the record as a whole could arguably support a finding that the Commissioner proved by clear and convincing evidence that the deposits were the property or income of petitioners?

c) Whether the Commissioner's investigation of reasonable leads that supported the explanation of petitioners was insufficient, and, if so, whether the Tax Court erred in not giving any weight to the Commissioner's failure?

d) Whether a decision in favor of the Commissioner was impermissible as a matter of law, or, in the alternative, an abuse of discretion as a result of the Commissioner's failure to investigate reasonable leads?

e) Whether the Tax Court made findings of fraud that were clearly erroneous?

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Tax Court, per Judge William H. Quealy. The hearing which led to the decision was held upon a petition which challenged the notice of deficiency served upon William Geller and his wife, Doris Geller. The deficiency included a 50% penalty for fraud. Petitioners asserted that the deficiency was incorrect, and that they were not liable for additional taxes for the years in question. Appeal is taken pursuant to 26 U.S.C. Sec. 7482,7483.

A)Proceedings Below:

In the hearing held before Judge Quealy in New York, New York on February 25,1976, the Commissioner of Internal Revenue alleged that in 1965 and 1966 petitioners had made deposits in the sum of $227,764.03 in an account with a brokerage house. The source of the deposits was alleged to be a corporation which, in 1965 and 1966, reported a decline in assets of several hundred thousand dollars. Petitioners were alleged to be the sole shareholders and managers of the corporation. A notice of deficiency stating that the deposits were income to petitioners was served upon them in March, 1973.

Petitioners denied that the deposits in the brokerage account represented their property or income, and maintained that their connection with the brokerage account nominal only. The bonds purchased through the account were, they said, either mailed or delivered to another person, the brother of one of the petitioners. The corporation was also the property of that brother and/or someone who did business through him. Petitioners

and their sons worked for the corporation, receiving and reporting salaries whenever received.

Petitioners further alleged that the three-year limitations period for the assessment of deficiencies (Section 6501(a) of the Internal Revenue Code) had expired, barring the assessment. The Commissioner answered that petitioners filed fraudulent returns in 1965 and 1966, thereby removing the limitations period (Section 6501 [c][1] of the Code). Petitioners denied that the deposits were income to them, or that they had committed fraud within the meaning of the Internal Revenue Code.

The Tax Court found that the Commissioner's determination was entitled to a presumption of correctness, that the evidence supported the presumption in favor of the Commissioner's determination and that the Commissioner had proved fraud in concealing income by clear and convincing evidence. The limitations period was held inapplicable because of the finding of fraud. The Commissioner's determination that William Geller should be assessed $111,123.57 for 1965, plus $55,561.79 as penalty, and $5,598.89 for 1966, plus $2,799.45 as penalty, was upheld in full. Petitioner, Doris Geller, was held not subject to the penalties only.

B) Statement of Facts:

On June 17, 1965, petitioner, William Geller, opened an account with the brokerage firm of Merril Lynch, Pierce, Fenner and Smith in the name of "Wolf Geller." (Resp. Ex.2-B, A.45-46) During the remainder of 1965, approximately $204,000

in bearer bonds were purchased through the account; during 1966, $24,151.25 in bonds were purchased. (Resp. Exs. H,I, A.48-49, 18-19)

The address on the account was not the address of "William Geller" or "Wolf Geller." It was the business address of Morris Geller, brother of William Geller. (Resp. Ex. 2-B, A.137) All confirmation slips were sent to that address, and the bonds were mailed there on up to six of the twelve occasions on which bonds were delivered. (A. 90,97) At other times the bonds were picked up by two people, one of whom was William Geller, and the other of whom was, according to different accounts, either Morris Geller or William Geller's son. (A.90,38)

William Geller did not take permanent possession of any of the bonds. Instead he delivered them to Morris Geller. (A.104)

Of $227,764.03 deposited in the account, the overwhelming bulk of which was in checks, $15,067.10 was shown to derive from bank accounts of 2377 Creston Corporation, and were in form of bank checks drawn to the order of William Geller. William Geller endorsed those checks with "William Geller" and then "Wolf Geller" before depositing them into the brokerage account. (Resp. Exs D,E,F,G,A.47,48,17-18)

In 1950, petitioners, William Geller and Doris Geller, were two of the incorporators of 2377 Creston Corporation, which, until a time in or after 1960, owned real property assets. The other incorporator was the sister of Morris Geller and William Geller. (A.140-142,145-147)

Petitioners or their sons (one born in 1941, the other in 1944) filed tax returns for the corporations and periodically received salaries as employees. (Resp. Exs. L, M, N, Q) The corporation maintained bank accounts, at least some of which were managed by petitioners as corporate officers (Resp. Exs. U, X, AA) The sums kept in those accounts and their disposition were not shown, except for the $15,067.19 in cancelled checks produced by the Commissioner.

In the corporate return for 1965, there was disclosure over the signature of William Geller as President, that cash had declined from the beginning of the year in the amount of approximately $230,000. At the bottom of the return was written, "We have no funds." The 1966 return, the corporation's last, showed cash and other investments going from a combined balance of approximately $67,000 to zero. (Resp Exs M, N, A.16) (The physical location of the assets when they were carried on the books of the corporation was not shown.)

The joint return of William Geller and Doris Geller for 1965 showed taxable personal income of $610; for 1966, income of approximately $3,000 was reported. (Resp. Exs J, K, A.19) The standard of living of petitioners and their children was notably moderate during this period. (A. 59)

In 1963 and 1964, petitioners offered to compromise their existing civil tax liabilities, which in 1964 amounted to approximately $170,000. (Resp Exs O, P, A.14)

ARGUMENT

I

THE TAX COURT ERRONEOUSLY APPLIED A PRESUMPTION OF CORRECTNESS IN FAVOR OF THE COMMISSIONER'S DETERMINATION THAT THE DISPUTED DEPOSITS WERE INCOME TO PETITIONERS

In finding that the deposits to the brokerage account were income to petitioners, the Tax Court applied a standard of proof that was altogether erroneous.

The standard that should have been applied was whether the Commissioner sustained his burden of proving by clear and convincing evidence that the deficiencies alleged by him constituted taxable income to petitioners.

The standard erroneously applied by the court below was whether the Commissioner's "determination that the unexplained deposits were income" was "arbitrary" or"unreasonable." If not, said the court, "then a presumption of correctness attaches to the determination." (A. 24-25,63,68,95,103,139,140,143)

The Tax Court did apply the "clear and convincing evidence" test to the issue of whether "petitioner's activities were conducted with fraudulent intent," (A. 26,40) but by then the main issue had been decided adversely to petitioners on the basis of a presumption. Aside from making findings of fraud that were themselves clearly erroneous, the Tax Court's error lay in making an initial and discrete finding of "taxable income" on the basis of that presumption, for the presumption may not be applied to any part of a case when the ultimate issue to be proved is whether fraud has been committed.

As a result of this error, the Tax Court did not consider the inadequacy of the Commissioner's proof that the deposits were

income to petitioners, an inadequacy marked by multiple failures of proof; nor did the Tax Court weigh the improbabilities and inconsistencies that the record shows inhere in findings that the deposits were income to petitioners and that petitioners pursued a course of conduct intended to defraud the government by concealing income; nor did the Tax Court consider the failure of the Commissioner to negative other, more likely sources of the deposits, a burden that established precedent places squarely upon the Commissioner.

Instead the Tax Court shifted to petitioners the burden of overcoming the presumption that was wrongly awarded to the Commissioner, which had the further effect of depriving the testimony and evidence offered by petitioners of its rightful force.

Prior to showing in detail that the correct standard of proof was not met, petitioners cite to this Court cases in which the principle was recognized that the burden of clear and convincing proof remains with the Commissioner as to all parts of a case in which the Commissioner alleges fraud; and further that where the taxpayer challenges the assertion that the receipt of money constitutes "income" to him the Tax Court itself has demanded far more of the Commissioner than was demanded in this case.[1/]

In Patrick H. Smith, 23 TCM 1661 (1964), despite the Tax Court's meager confidence in the taxpayer's testimony that the sum that he admittedly received was not income to him("he appeared all too ready to bend the facts to meet the exigencies of the situation as he understood them." Id, at 1665), the Tax Court

1. In this case not even the "receipt of money" or the like was shown.

found: "But before the amounts in question or any parts thereof can be classified as income to [taxpayer] it must be established that he retained those amounts or portions thereof for his own benefit. The record is devoid of such proof, and we must hold that the Government has failed to carry its burden of proof." Id, at 1664-1665.

In Russell C. Mauch, 35 B.T.A. 617(1937), the taxpayer contended that amounts in his bank account did not belong to him, but were held for others. The Tax Court retorted that the funds "were deposited by the petitioner in his bank account and commingled with other funds belonging to him; and they were used freely by him for his own benefit and enjoyment. The statutory definition clearly includes items such as these." Id, at 627. Unlike the Tax Court in the case at bar, the Tax Court in Russell C. Mauch understood the issue: "The real question in the case is to determine whether or not the evidence shows that these funds were income to petitioner. If it does not, then the Commissioner has failed to prove fraud." Id, at 626. Only when the court determined that there had been commingling and application to personal use would the court find the evidenee clear and convincing that the amounts in question were income to the taxpayer.

The rule that the Commissioner must prove every element of the offense when he alleges fraud is widely recognized.

"Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt." Holland v. United States, 348 U.S. 121, 138 (1954).

("Nor is Holland distinguishable on the ground that it was a criminal case while this is not. Although the government's proof need satisfy a less stringent standard in a civil case, this only affects the quantum of proof required, and does not justify effectively relieving the government of its burden [Citations omitted]." Armes v. C.I.R., 448 F.2d 972,975 [5 th Cir., 1971])

"Since the burden was on the Commissioner to prove fraud, it must follow that he had the burden of proving every subsidiary fact relied upon by the court to support that ultimate conclusion. To permit, in satisfying that burden, the use of a Commissioner's finding that was to be accepted only because the taxpayer had failed to meet a burden of overcoming it, would be to allow the Commissioner to raise himself by his own bootstraps [Citations omitted]." George v. C.I.R., 338 F.2d 221,223(1st Cir.,1964)

"As to the fraud penalty which the Commissioner sought to impose...there are no presumptions of correctness attaching to the Commissioner's findings. The Commissioner has the burden of proving fraud by clear and convincing evidence." Goldberg v. C.I.R., 239 F. 2d 316, 320 (5th Cir.,1956)

"We are mindful that respondent [Commissioner] cannot meet his own burden of establishing fraud on the basis ofpetitioners' failure to discharge the burden of proving error in the determination of deficiencies,and we do not, of course, rest our findings on that basis." Tsuneo Otsuki, 53 TC 96,106 (1969)

"A failure to overcome the presumptive correctness of a deficiency cannot be regarded as proof of fraud. [Citation omitted] Likewise, a failure of proof cannot be substituted for the evidence necessary to sustain respondent's affirmative burden. [Citations omitted] ....

"While [the Commissioner] succeeded to some extent in creating an air of suspicion as to petitioner's activities in 1954 and 1955, we cannot transmute mere suspicion into hard fact or, for that matter, into even reasonably believable circumstantial evidence." Louis L. Staffilino, 25 TCM 110,114(1966)

"And just as the petitioners [taxpayers] failed to show that the deposits in controversy did not in some substantial part represent income, the respondent [Commissioner] has similarly failed to prove that the amounts in question were income." Thomas B. Jones, 29 TC 601, 619 (1957)

"The respondent [Commissioner], having asserted fraud, is charged with the duty of establishing it by more than a mere preponderance of the evidence. The evidence must be clear and convincing. [Citations omitted] ." Frank A. Maddas, 40 B.T.A. 572, 578(1939)

Furthermore the cases cited in the Tax Court's Opinion (A. 25) recognized that the Commissioners' "presumption of correctness" could not form any part of a conclusion that taxpayers committed fraud.

"Of course, petitioners' failure of proof on these expense items for deficiency purposes does not relieve respondent of the

ultimate burden of proving fraud by clear and convincing evidence. To do otherwise would be piling inference on inference [Citation omitted] ." John Harper, 54 TC 1121, 1140(1970)

"After a painstaking analysis of all of the evidence in this case...we are convinced that petitioners received substantial taxable income during each of the years..." Dorothy E. Beck, Estate of, 56 TC 297, 364 (1971)

The Tax Court in this case, however, made no attempt to relate the "numerous instances of affirmative evidence that petitioner's activities were conducted with fraudulent intent" (A. 40) to the issue of whether the deposits were income to them. For this reason, some of the "indicia of fraud" have no logical connection with that issue; others may be considered indicia of fraud only if it is first assumed that the deposits were petitioners' income; and there was no attempt made to determine whether any of those "indicia" might not also have been consistent with the explanation given by petitioners.

For these reasons, petitioners submit that no other conclusion is possible but that the lower court misused a presumption to the great detriment of petitioners.

II
THE COMMISSIONER'S CASE, EVEN IF IT HAD BEEN UNREBUTTED, FAILED TO OFFER EVIDENCE THAT HIS CONTENTIONS WERE WELL-FOUNDED, AND CERTAINLY WAS NOT SUFFICIENT TO BEAR HIS BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE

The Commissioner's proof that the deposits in question were income to petitioners shows, when viewed most favorably to the Commissioner, the following: Petitioner, William Geller, opened an account with a brokerage firm in June, 1965. The name on the account was Wolf Geller. Through that account $228,000 in bearer bonds were purchased. William Geller, accompanied by a young man, picked up the bonds at least six times out of a total of a dozen transactions. He made deposits to the account in the sum of $15,067.19, consisting of four checks drawn to the order of William Geller from the account of 2377 Creston Corporation. William Geller's connection with 2377 Creston Corporation was that he was one of the incorporators; he was sent the corporation's income tax returns, took them to an accountant with information for their preparation, signed the returns as president, and had the right to withdraw money from the corporation's savings accounts. In 1965, petitioners' two sons, both in their early twenties, were compensated as officers in the aggregate sum of $12,200. In 1965, the assets of 2377 Creston Corporation (mostly cash) diminished by approximately $240,000; in 1966, cash and other investments declined from a total of $67,000 to a zero balance.

This is the entire case made by the Commissioner, omitting many facts that counter or diminish the Commisioner's argument and

support the explanation by petitioners. It is this proof that must overcome, clearly and convincingly, that explanation, and show it to be palpably false. That explanation was that petitioners worked for the corporation, receiving only the salaries duly reported on the corporate and personal income tax returns, and that the brokerage account in the name of Wolf Geller was used by the true owners of the corporate assets and the bonds in the account as a convenient and safe way of purchasing the bonds without listing their identities.

There is not a scintilla of proof that petitioners commingled either the corporate or brokerage account assets with their personal assets [2/]; or that petitioners retained any part of those assets, except for the salaries paid them or their sons; or that petitioners expended any part of those assets for their personal benefit. Even indirect proof was lacking, the Commissioner having made no attempt to show any of the living expenses of petitioners. While these factors alone may not prove that the amounts in question were not income to petitioners, the Tax Court's reasoning in Patrick H. Smith, supra, is equally in point here: "Perhaps, if the burden were on [petitioner] we might not be able to find that all of the amounts were thus distributed by him [and hence not income to taxpayer]. But the burden was not upon him; it was upon the Government." [Emphasis in original] 23 TCM at 1665.

The Commissioner's case is especially weak at the point of

---

2. The $15,000 of the corporation's money was simply shunted to the brokerage account.

linking petitioners to the "missing" corporate assets and the deposits made into the brokerage account. It was not shown that petitioners had access to the assets of 2377 Creston Corporation except to the extent of $15,067.19 in checks that were produced by the Commissioner. Petitioners have always maintained that their role as nonproprietary employees of the corporation required them to work with checking accounts that contained, at the least, sums sufficient to pay corporate income taxes and meet whatever other expenses the corporation had. (In addition to corporate taxes, the record discloses that the corporation paid salaries to two officers in 1965 and retained an accountant.) The Commissioner offered no other cancelled checks that related to 2377 Creston Corporation or to petitioners, and did not explain his failure. The only inference permissible is that petitioners kept the books of the corporation, but did not control its assets, or even have nominal access to those assets save for the small amounts required for operating expenses.

As to the transfer of the $15,067.19 by William Geller, as President of the corporation, to the brokerage account of Wolf Geller, the exchange of any funds between the two accounts is as consistent with petitioners' contentions as it is with the Commissioner's. Moreover, as a "cleaning out" of the funds handled by petitioners from the moribund corporate account to the nominee "Wolf Geller" account, the proven transfer of only $15,067.19 is more consistent with petitioners' contentions that they did not control the assets of the corporation.

Similarly, the deposits into the brokerage account were linked to petitioners solely through the four checks referred to and the recollection of a customer's man for the brokerage house that William Geller would make the deposits prior to picking up the bonds. The testimony, however, does not attempt to explain who made the deposits on the up-to-six occasions that William Geller did not pick up the bonds, and also leaves wide open the question of the financial source of the balance of the $228,000 in deposits other than the corporate checks amounting to $15,067.19 of that sum.

Another area of inadequate proof concerned who picked up the bonds--on those occasions when the bonds were not mailed out. The former employee of the brokerage house testified that when pick-ups of the bonds were made in person, they were always made by William Geller, who was usually accompanied by a young man. William Geller claimed that another person would typically make the pickups, or that he, William Geller, only accompanied that person to the brokerage house when the brokerage house employee saw him there. Although the difference is not significant in answering the question of who owned the bonds, it should be wondered why, if the Commissioner were serious about sustaining his heavy burden of proof, the delivery slips for the bonds were not produced (A. 90-91) and the person or persons who supposedly accompanied petitioner were neither questioned nor summoned (A.105-106).

The elements of the Commissioner's case relied upon by the Tax Court in finding for the Commissioner illustrate that the evidence fell far short of the standard of clear and convincing

proof.

Before going down those points, it should be recognized that the Tax Court did not find that the proof was clear and convincing on the issue of whether the deposits were income to petitioners. The Tax Court merely held that a presumption of correctness applied in this respect in favor of the Commissioner, that the evidence cited by the Commissioner "supported" his determination (A. 25), and that petitioners had failed to overcome the presumption thus "supported."

Most of the evidence relied on by the Tax Court consisted of the appearance of William Geller's signature on corporation income tax returns and bank accounts. Undeniably this evidence "supports" the presumption that had already been awarded to the Commissioner, but it is also consistent with petitioners' claim that they were employees of the corporation whose identities were used by other persons who preferred, for whatever reason, to stay in the background. Even if the standard of proof were less exacting than it is, it cannot be said that this evidence showed that the Commissioner's interpretation of events was more plausible than that of petitioners.

The presence of petitioners' signatures on the Certificate of Incorporation of 2377 Creston Corporation was apparently the whole case against them, or so it seemed at the hearing after the Judge had heard all the other parts of the Commissioner's case.[3/] That the lower court misread that Certificate cannot be

3. Commenting on the Commissioner's efforts to determine who actually owned the bonds in the brokerage account, the Court

controverted, and all the logical inferences that the court derived from the Certificate must fall away accordingly. The court was under the impression that there was proof that petitioners "at least started out owning the stock" (A. 139), and that there was no indication that there had been any change in ownership. On that basis the Court called it a "reasonable assumption" that "these withdrawals must been Dr. Geller's income." (A. 140) The premise, however, was wrong. Petitioners did not own all the stock. The Certificate shows that together with Morris Geller's (and William Geller's) sister they were "the directors until the First Annual Meeting of the Stockholders," (A. 146 , Paragraph Eighth) and that of fifty shares of capital stack, petitioners together "agree[d] to take" a total of two shares.[4/] There is no evidence that anything

3.(continued) responded as follows to the agent's reference to the"evidence":"Well, I mean, what evidence are you talking about? That's the thing that's puzzling me here is that you interviewed Mr. Solomon Geller and that was unproductive, wasn't it? There was nothing in the interview with him that would prove anything other than the fact that at that time you didn't know who was--who had the--the case of the missing two hundred and thirty thousand dollars." At that point, the agent brought up the Certificate of Incorporation.(A. 137-138)

4. Again, that the Certificate bore the names of Morris Geller's relatives should not be surprising in view of petitioners' explanation of their visible role in all corporate matters.

but the formality of "agreeing to take" was satisfied; that it should be presumed that petitioners owned twenty-five times as much corporate stock as they "agreed to take" is a strikingly unreasonable determination, and constitutes one more threadbare link in the chain of "clear and convincing evidence" that the Commissioner should have been required to establish.

Another piece of evidence treated as "vital" to the preservation of the presumption favoring the Commissioner was, in the eyes of the Tax Court, that petitioners' "two young sons were salaried officers" of the corporation, but with unspecified duties. Further on in this brief, the factor of "unspecified duties" will be shown to be a canard; at this point petitioners express consternation that anything so straightforward should be twisted into evidence against them, and material evidence, at that. (A.17,23,40)

Operating the corporation did entail paperwork, as the Commissioner's own exhibits indicate. Petitioner, William Geller, testified that when he was too ill to do it, his sons did. If petitioners' account has the least validity it is anything but implausible that Morris Geller, and whoever was working with him, would be pleased to pay the sum paid in 1965 to Morris Geller's nephews. Petitioners respectfully urge(especially when taken with the indefensible distortion that "petitioner was unable to name any services which [their sons] performed for the corporation" [A.40]) that reliance on evidence such as this shows with force that the Commissioner did not satisfy his burden of proof.

To the contrary, it may be said, albeit unnecessarily in view of the Commissioner's burden, that the limited evidence offered by the Commissioner lends credence to the contentions of petitioners, contentions that grow in strength as other aspects are reviewed.

III
A FINDING OF FRAUD IS INCONSISTENT WITH A NUMBER OF UNCONTROVERTED FACTS, NONE OF WHICH WERE WEIGHED BY THE TAX COURT

If the correct standard had been applied, the Commissioner could have prevailed in the lower court only upon a showing that petitioners were engaged in a scheme to defraud the government of the United States. So many improbabilities, contradictions and inconsistencies stand between the evidence of record and a finding of fraud that a review of the record as a whole will show that the standard of clear and convincing proof was not approached.

1) William Geller signed and filed the corporate returns for 2377 Creston Corporation in 1965 and 1966, after having them prepared by a firm of accountants. The contrast between 1965 (and, to a lesser extent,1966) and the previous year could not have been more sharp, the 1965 return was inscribed at the bottom with the notation that the corporation had no funds, and if those returns make one thing unmistakably clear, it is that the corporation had parted with virtually all of its assets in those years. The only way in which the returns could have escaped meticulous scrutiny and analysis would have been if the Internal Revenue Service had closed up shop.[5]

Petitioner, William Geller, knew this. As the Commissioner alleged, and the lower court found,he was not ignorant of the ways of the Service. (A.42)

Investigation into what was going on in 2377 Creston Corpor-

---

5. At the times referred to, and at least until 1971, William Geller's brother, Morris, was alive. This may be helpful backdrop to petitioners' course of conduct.

ation began in 1968, and naturally centered on petitioner, William Geller. To suggest that he did not foresee an investigation similar in scope to the one he had suffered some years earlier is to deny the understated finding of the TaxCourt that petitioner had extensive past dealings with the Commissioner. When that investigation came, he told the Commissioner's agents precisely what he told the Tax Court eight years later: that he was an employee of the corporation and did not know the ultimate disposition of its assets.(A. 110,111) In addition he gave the investigators the name of the accountant who kept the corporation's records (not the firm whose representative testified at the hearing below).

Despite this, the Commissioner maintains that he proved clearly and convincingly that William Geller engaged in a scheme to defraud him by manipulation and concealment. The record, however, far from painting a picture of subterfuge or concealment, indicates that nothing was hidden; petitioners' conduct cannot be reconciled with an intention to mislead or defraud. The Commissioner has not cited a case of fraud in which the factual pattern was remotely similar to the one in the case at bar;the reason is the extreme improbability that a scheme of fraud and concealment would be accompanied bya filing on the part of a somewhat knowledgeable taxpayer that would predictably uncover all the facts that were uncovered.

See Estate of Lawrence J. Maloney, 30 TCM 71,79(1971):

"Contrary to an intent to defraud within the meaning of the revenue laws, the handling of this incident by the decedent would lead this Court to conclude that the decedent, at least in this instance, was careful to report the income that he received through collections....This negatives an intent to defraud within the meaning of section 6653(b) [of the Internal Revenue Code]."

Again, petitioners are not compelled to adduce this evidence insupport of proving their innocence, but they do emphatically submit that much, much more must be proven by the Commissioner on these facts to establish by clear and convincing evidence that they committed fraud.

"Upon a consideration of the evidence in light of the decedent's position as assistant superintendent of the uniform division, the returns filed by the decedent, and the failure of the respondent [Commissioner] to account for questions raised by respondent's proof, this Court must necessarily find that the respondent has failed to prove by clear and convincing evidence that there was an underpayment of tax due from decedent...on account of fraud within the meaning of 6653(b) of the Code." Estate of Lawrence J. Maloney, supra, at 79.

2) The record discloses filings for the corporation since 1964; presumptively corporate filings by petitioners or their sons were duly made since the early 1950's.[6] In the years

---

6. If this were not so, petitioners should not have been linked to the corporation from its inception, and petitioner's claim that they were employees of the corporation is firmly established. See also A.75

prior to 1958, petitioner, William Geller, was investigated by agents of the Internal Revenue Service. In 1958, he pleaded guilty to charges of income tax evasion. In 1963 and 1964, petitioner was in contact with the Internal Revenue Service on the subject of compromising his tax liability. Nevertheless, the Commissioner urges that petitioners' beneficial ownership and control of the hundreds of thousands of dollars of the assets of 2377 Creston Corporation, the corporation for which they had been openly filing returns since the early 1950's, is self-evident to the degree that the Commissioner is entitled to a finding of fraud based on the standard of clear and convincing evidence.

It would be incredible if petitioners kept filing and signing those corporate returns while being subjected to a continuous series of probes by the Internal Revenue Service over a period of years, probes which had led to and followed upona criminal conviction. Equally as incredible would be the Commissioner's dereliction in not locating assets that he now claims have been there for all to see for many years. The record contains not one word that adverts to the difficulty in accepting a contention that on its face is so peculiar, and that betrays so very strongly an impression of inconsistency witha finding of ownership of the corporate assets by petitioners, particularly when that finding should be based on clear and convincing evidence.

"While this is a significant amount, the question of whether the omission, if any, was due to fraud must be weighed

in the light of the fact that a special agent began his investigation and first interviewed Walter in December, 1964, nearly 3 months before the 1964 return was filed. Walter relied upon an accountant to fill out his income tax returns, and we think it incredible that he was not aware of the possible consequences of deliberately filing a fraudulent return at that point. For this reason alone, we must examine reporndent's determination as to fraud with great care." Walter E. Bevan, 30 TCM 1337, 1343-4(1971)

"In fact petitioner's continued use of accountants to prepare his tax returns is some indication of his intent to pay the taxes due." Bernard B. Hahn, 32 TCM 895,900(1973)

"At least one other circumstance raises serious questions as to the reliability of the contractors' testimony. Among the checks identified by five of the Government's key witnesses as having been given in furtherance of the fraudulent scheme were 19 checks dated after Gulf's investigation began in December, 1959.... The contractors thus knew they were being investigated or had already made settlement payments when these five crucial witnesses say they were making payoffs to the petitioner." Jewel E. Boyd, 29 TCM 828,833(1970)

3) The address of the brokerage account was not that of petitioners. It was the business address of Morris Geller, William Geller's brother. The Commissioner's witness testified that possibly half of the bonds purchased through the brokerage house, and all of the confirmation slips, were mailed to Morris Geller's address.

Regardless of whether or not this item confirms petitioners' contention that Morris Geller and another background figure were the persons who controlled both the corporation's assets and the brokerage account, the salient point is that the Commissioner offered no explanation of why, or the mechanics by which, petitioners may be said to be the owners of bonds that they never received, and for which they probably did not deposit any money, whether theirs or anyone else's.

4) A similar failure of proof or explanation accompanied the evidence that William Geller opened the brokerage account in the name of Wolf Geller. Unless the Commissioner can establish that this act was part of a fraudulent scheme to conceal the assets in that account, the Commissioner will have been left without the keystone to his allegations of fraud. That those allegations concerning the opening of the brokerage account are self-serving dogma will be shown in a later point; here petitioners note one more element in the Commissioner's case against them that does not mesh with the lower court's findings.

5) William Geller stated that his living expenses at all relevant times were extremely moderate. The Commissioner treated the issue as if it did not exist. Precedent, however, is on the side of petitioners, and the lower court's disdain to mention or consider the factor of living expenses in the course of deciding a case in which petitioners claimed that they did not

receive hundreds of thousands of dollars is further evidence that the standard of clear and convincing proof was overtaken by a misapplied presumption and is further reason for reversal.

"Petitioners income level was not high enough for the alleged kickbacks totaling $36,526.22 to have made no noticeable difference....Not only do his expenditures during the years in question fail to corroborate any unlawful receipts, but his standard of living subsequent to leaving Gulf's employ--working first as a handyman for his brother and later as a motel manager at a salary of about $130 a month-- provides no support for a theory that he secreted his allegedly ill-gotten gains." Jewel E. Boyd, supra, at 833.

"Another indicia relied upon by the respondent in similar cases is a showing that the taxpayer had resources or made expenditures in amounts incompatible with the taxpayer's reported income. In this case there is no indication that the decedent spent or had at his disposal large sums of money. [illegible] he contrary, the evidence tends to show that the decedent lived frugally." Estate of Lawrence J. Maloney, supra, at 79.

In sum, the improbabilities of the Commissioner's case, particularly those that inhere in a belief that the corporation and its assets belonged to petitioners when petitioners continuously made unimpeached corporate tax filings for the many years that preceded and included the years in question, are so substantial that the Commissioner's response that "no one but petitioners were identifiable as owners of the corporation" and that, besides, he did not like the way petitioners answered his questions cannot begin to satisfy his burden of proof that petitioners fraudulently concealed income.

IV

THE COMMISSIONER'S INVESTIGATION INTO THE OWNERSHIP OF THE BONDS WAS LESS THAN RUDIMENTARY; AS SUCH PETITIONERS' RIGHT TO A FAIR INVESTIGATION WAS PREJUDICED AND DECISION SHOULD BE ENTERED IN THEIR FAVOR

Whenever the Commissioner uses the net worth or bank deposits method of proving the receipt of taxable income he must negative all exculpatory explanations that come to his attention and are reasonably susceptible of disproof.

The only way of doing this is to investigate all leads with due diligence. In this case, the failure of the Commissioner to investigate the person logically connected to the deposits in the brokerage account is incomprehensible, and the Tax Court Judge, who at the hearing was astounded at the Commissioner's failure of investigation, later ignored this factor in his decision

Morris Geller was identified by petitioners as the owner or one of the owners of the corporate assets and of the bonds bought through the brokerage account. Morris Geller's business address was the address of the brokerage account. He was mailed all the confirmation slips and up to half of the bonds bought through the account. Morris Geller used the same accountant as did William Geller and 2377 Creston Corporation. Yet the Commissioner's investigation was so half-hearted and scanty that the Judge of the Tax Court criticized the agent who testified and--unlike parallel investigative documents--would not permit the materials obtained relative to Morris Geller to be received into evidence.

The agent of the Internal Revenue Service sought to interview Morris Geller because "he was the only Geller at the address listed on the Bache brokerage account." The Judge of the Tax Court asked the agent:"so as far as you know,this may have been his money?" The agent answered,"I was trying to definitely determine that, Your Honor." (Prodded by the court, the agent went on to concede that he was not successful in making that determination, but based his conclusion that the money was income to William Geller on the latter's "untruths" and the Articles of Incorporation of 2377 Creston Corporation.)(A. 137-38)

The agent therefore went to Morris Geller's place of business and asked him "several questions relative to his brother"; Morris Geller "was not responsive." 7/ The agent then gave Morris Geller a summons to appear to testify to certain matters (A.124), but the summons inexplicably assumed facts that were the opposite of petitioners' contention. Morris Geller responded with a note in answer to the summons. The note was read into the record by William Geller. It denied that Morris Geller had managed stock

7. William Geller maintained that Morris Geller, before he died, had told him that Morris had explained to the agent Morris' role in the assets in question. (A. 74) This conflicted with the agent's recollection. The agent, however, testified to what had happened five years earlier without the benefit of a memorandum. The Court had asked the agent, " [Y] ou wrote a memorandum of the visit, didn't you?" The agent (Schulman) answered,"I don't believe so, Your Honor." The Court replied: "Well, I hate to say so, but I don't believe you, Mr. Schulman." (A. 122-123) In its Opinion herein the Court reversed its field, saying, "We choose to believe respondent's agent." The Court reasoned that Morris' failure to appear in response to the summons and his written denial of knowledge of security transactions made with or for the petitioner constituted evidence of evasiveness rather than candor.(A. 31) However this may be, neither the agent nor the Court attempted to explain why the investigation came to a halt at the very point that it was determined that Morris might have been hiding something, or considered that the evasiveness might have commenced when Morris was asked to "put it in writing" or give his admission under oath.

transactions with or for the benefit of William Geller. In colloquy with counsel to the Commissioner, the Court commented, "I don't know that it disproves anything that the taxpayer has testified to....This letter doesn't say [William Geller] didn't [conduct certain transactions on behalf of his brother Morris Geller] .... [T]he problem with this counsel, is that the summons is not worded the way you would like to have the answer read." (A. 133-135) Earlier, William Geller agreed that Morris had answered properly: "...I [William] have testified, he [Morris] didn't manage my affairs, I managed his affairs....He didn't do anything for me, I never claimed that. I worked for him."(A.133

Subsequently the court ruled the note inadmissible.[8]

In response to Morris Geller's evasiveness the Commissioner did nothing. The agent's suspicions were not aroused; instead he shrugged it off and continued to delve into the affairs of people who had nothing to do with the deposits. At the hearing the pattern of neglect continued. When the accountant for William Geller and 2377 Creston Corporation testified that he was also the accountant for Morris Geller (William Geller stated that the senior accountant who consulted with them knew the true relationship between Morris and the corporation [A.102]) , the following information was developed by counsel to Commissioner:

> Q: Do you recall preparing returns for
> Morris Geller?

---

8. Petitioners submit that the ruling was error to the extent that it might deprive them of the benefit of the note's contents. At the least, the note was admissible for the purpose of showing the nature of the response received by the Commissioner and of supporting petitioners' challenge to the Commissioner's inaction from that point on.

A: Yes.
Q: And do you recall at all where he lived at the time? Were you familiar with that?
A: Yes, I knew Morris Geller. I knew Morris Geller.
Q: And do you know where he lived?
A: Morris Geller lived--Ibelieve he lived in Scarsdale. I--
Q: Do you know where his business office was?
A: On East 149th or 148th Street in Manhattan.
[Counsel:] All right. Thank you. No further questions, Your Honor. (A. 100; Transcript, 86)

The conclusion to be drawn is as inescapable as it is frustrating to petitioners: When signs appeared to implicate Morris Geller, investigation stopped. Had it continued, petitioners are confident that they would have been absolved of all liability.

In contrast, the agent conducted anything but an anemic investigation in pursuit of information useful against petitioners. He held 13 or 14 interviews, including a lengthy one of another brother of William Geller. For the intensive tone and manifest thoroughness of that interview, and the massive investigation of that other brother's financial relationships, Respondent's Exhibit AF herein should be consulted. Notwithstanding the fact that there was absolutely no suggestion of a link between that other brother and petitioners, the amount and quality of the investigation speaks for itself, and poses the question of what might have been had other phases of the investigation been pursued with comparable vigor. (A. 120, 125)

The governing law is well established. Petitioners offer the following excerpts in support of their contention that it was clearly unreasonable, as well as a violation of settled legal

principle, for the Tax Court to have found against petitioners when the Commissioner failed egregiously in his duty to investigate reasonable leads.

"...[The Government's] failure to investigate leads furnished by the taxpayer might result in serious injustice.... When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer--leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done....

"Admitting that in cases of this kind it 'would be desirable to track to its conclusion every conceivable line of inquiry,'

the Government centered its inquiry on the explanations of the Hollands and entered upon a detailed investigation of their lives covering several states and over a score of years." Holland v. United States, supra, 348 U.S. at 135-136.

"But when the net worth method is used... [the Commissioner] must also show that he has tracked down leads furnished by the taxpayer, reasonably susceptible of being checked, which, if true, establish taxpayer's innocence....

"In this case we cannot find that respondent has shown by the evidence presented that he made a very determined effort to establish with the certainty that we would consider reasonable a complete and accurate opening net worth for petitioner, or to negative the explanations given him by petitioner which might tend to establish his innocence of fraud....

"It may be that respondent's agents did investigate all the reasonable leads petitioner gave them, but, if so, it is not apparent from the record....

"We have examined the entire record and are not persuaded that the evidence is sufficient to establish fraud. Respondent's case is based on inferences and assumptions which are not all supported by the evidence and we feel that respondent has not shown that he made a reasonable effort to prove the truth of the inferences and assumptions. We recognize that there is enough in the record to support a strong suspicion of fraud, but 'Mere suspicion of fraud and mere doubts as to the intentions of the

taxpayer are not sufficient proof of fraud.' L. Glenn Switzer, [20 TC 759,765] " Lawrence R. Godfrey, 27 TCM 966,973-4(1968)

"In addition we have doubts as to whether [the Commissioner's] investigation were properly thorough and accurate....

"Respondent had the obligation to investigate the financial circumstances of [taxpayers' relatives] in order to determine if such gifts as petitioners claim could have been made by them. One indication of their ability to make such gifts would be their respective income tax returns. However, repondent presented no evidence indicating that he had done anything and as a result must bear the consequence for which the Holland case provides." Joseph Kendzie, 27 TCM 845,856,857(1968)

See also Bernard B. Hahn, supra at 900:"After viewing the entire record, though not entirely free from doubt, we feel that the [Commissioner] has failed to sustain his heavy burden of proof. His failure may, in part, be attributable to the passage of time from the years before the Court. However, we can only assume that the delay is of his making since the statutory notices are dated May 17,1971, over 9 years after the last return in issue was filed."

The Commissioner's failure to investigate this case extended to other areas and was to the prejudice of petitioners only.

When first questioned in 1968, petitioner, William Geller, told the Commissioner's agent the name of the accountant who was entrusted with the corporate records. It is true that at the hearing the agent who testified offered to explain why he did not

meet with that accountant. The Judge, however, precluded the agent's explanation. Whatever the reason, petitioners are entitled to have their direct answers to the agent's questions treated seriously. The fact remains that no audit was made of the corporation's books, and the record will not permit the conclusion that petitioners shared any responsibility for the failure.

The real property assets of 2377 Creston Corporation, which gave rise to its liquid assets, were so little known to the Commissioner that a fact so basic as the approximate date of sale of the real property was the subject of confusion and remains undetermined. Petitioner, William Geller, demanded to know at the hearing why the Commissioner's agent did not "go to the tenants of that building and ask them who is running this business here, who is running it, who--who's the boss here?" (A. 140-141) The Court interjected that the building was supposedly sold in 1960 (contra the determination of counsel to the Commissioner that it was sold in 1965 and 1966) and was "of no consequence." (A. 141-142) Petitioners respectfully disagree, and urge this as a separate ground for reversal. If Morris Geller held himself forth to tenants and contractors as landlord, the conclusion that petitioners owned the building that was later liquidated would have been less acceptable to the Tax Court, and surely would have made impossible a finding to that effect based on clear and convincing evidence. The Commissioner should

have investigated this reasonable lead. That he did not, choosing instead to presume that petitioners were engaged in fraud, should redound to his detriment, not petitioners'.

The deed of sale that translated the corporation's assets from real property to cash and securities was not even researched. The Judge of the lower court wanted to know "who signed the deeds?" (A. 78-79) The Commissioner knew nothing of the transaction. Although it would be consistent with petitioners' case if their names appeared on the deed, investigation which may have turned up relevant facts was at least pertinent, since petitioners had steadfastly maintained that they owned neither the real nor personal property of the corporation. The Commissioner's failure should be seen in the context of a pattern of presuming fraud by petitioners, a pattern erroneously reinforced by the Tax Court. Reversal is therefore indicated.

V
THE TAX COURT'S FINDINGS OF INDICIA OF FRAUD ARE UNABLE TO WITHSTAND SCRUTINY; THEY ARE CLEARLY ERRONEOUS AND OFTEN HIGHLY IMPROPER

Petitioners will show that almost every important finding in the Tax Court's Opinion is clearly erroneous. Reversal of the decision below should follow of necessity, all the more so as the erroneous findings are also the Tax Court's bases for finding that petitioners committed fraud, without which all parties concede that the statute of limitations has run.

In the opinion below, in the portion denominated as "findings

of fact," the Judge cites a memorandum prepared by agents of the Commissioner of a conference with petitioner, William Geller, on March 5, 1969. The Judge summarizes the contents of the memorandum, and bases material elements of his opinion upon it, including the findings of fraud. (A. 21) The impropriety of doing so is great: the memorandum--Exhibit S marked for identification-- was not admitted into evidence. It is not part of the record. The Judge had rejected the exhibit on the ground that "this statement is not relevant to the issue we have before us." (A.114-17) Reliance on the "exhibit" is therefore not only misplaced, improper, and puzzling, but sets the tone for the entire "memorandum findings" of the lower court, much of which is equally as curious.

The Judge continued: "On subsequent occasions, petitioner refused to meet with repondent's agents in connection with an inquiry into his individual tax liability."(A. 21)

This is not an insignificant finding. It is the basis of the Tax Court's approval of the financial reconstruction methods used by the Commissioner and one of the prime indicia of fraud cited by the Tax Court. (A. 25,41) Yet the finding not only has no support in the record; the Commissioner did not allege that petitioners failed to meet with its agents.

Petitioner was sent a letter dated January 30,1969 to appear in the agent's office on February 5th, 1969. Aside from the Commissioner's regrettable high-handedness in giving peremptory

notice, petitioner, William Geller, suffered a heart condition and had to postpone the appointment. The meeting did take place on March 5, 1969, one month after the date that had been set too hastily. (A.113)

The Judge asked the agent: "Did you ever have another meeting with Dr. Geller?"

The agent answered: "Not to the best of my recollection." (A. 111,112)

At no point was there mentioned any attempt to convene a meeting with petitioners to investigate their case. On the contrary, William Geller testified without rebuttal that he had tried to arrange such a meeting on numerous occasions. Instead he was told to "come down and settle." (A.31,129-130)

The Tax Court's insistence, which runs as a theme through its opinion, that petitioners failed to cooperate with the Commissioner's agents is contradicted by petitioner's listing as the address of the brokerage account the business address of Morris Geller, petitioner's revelation of the name of the accountant who kept the corporate records and the consistent explanation given by petitioners from 1968 through 1976 of their relationship to the corporation and to the brokerage account. More significantly, there is not one iota of evidence in the record that would tend to support the finding. 9/

9. In view of the extreme difficulty that petitioners have in comprehending this particular finding, conjecture may be in order. Perhaps the Judge meant that he believes that the deposits in the brokerage account were income to petitioners,

The Tax Court also misread the record (if not out of mistake, then the misreading constitutes an improper manipulation of the record) when it stated: "During 1965 [petitioner William Geller's] two young sons were salaried officers [of the corporation], yet petitioner was unable to name any services which they performed for the corporation." (A. 40) The only truth in the assertion is that petitioners' sons, the youngest of whom was 21 years old, as the Tax Court had found earlier (A. 17), received salaries from the corporation. However, petitioner, William Geller, never was asked to describe the work that his sons performed for the corporation. The following exchange must be the one that the Judge was alluding to:

> DR. GELLER: Well, the only thing that you brought out here, that you pointed out, is that I was on the payroll--
> THE COURT: You weren't on the payroll.
> DR. GELLER: --and I received a salary and I reported it.
> THE COURT: Your--why would your eighteen-year-old son be on the payroll if you didn't own the company?
> DR. GELLER: Well, if he--if--
> THE COURT: What was he doing?
> DR. GELLER: --I was not on the payroll, I let him take the property. We can't both--both at the same time, it's either I or he. Because I was ill and I didn't do any work there, I let him do the work and he got the--he got the salary.
> THE COURT: Do you have any--

(continued) and that their refusal to admit this and furnish details amounts to concealment and fraud. The problem with this is twofold: Whatever the lower court believed, petitioners' unrelenting assertions to the contrary cannot in themselves be evidence of fraud or even "uncooperativeness." More significantly, the argument is circular if put to the use of proving that the deposits represented income to petitioners (which concededly was found by the lower court before beginning to treat the issue of fraud): petitioners' refusal to admit that the deposits belonged to them leads to the conclusion that the deposits belonged to them. The premise, of course, assumes the conclusion.

DR. GELLER: Both of us weren't on the payroll.
THE COURT: --further evidence, counsel?(A.143-4)

It is obvious the petitioner thought he was being asked how it was that his sons, and not him, were on the payroll in 1965. William Geller made it known repeatedly that he had great difficulty hearing (A. 118,128), and it is very unlikely that he heard the Judge ask, "What was he [your son] doing?" The question itself could have been clearer, and an opportune time for clarification would have been when Dr. Geller finished his brief answer to what he thought was the question. The question could then have been phrased, "What work did you let him do?" Instead the court turned to Commissioner's counsel and asked if there were any further evidence.

The lower court evidently gave much weight to the presence of petitioners' two sons on the payroll.(A. 40) To do so was itself error, for reasons set forth elsewhere herein. But to state that petitioner was unable to name any services performed by his sons is untrue. This Court should not permit the decision of the lower court to stand when the method of decision is transparently unworthy of a federal tribunal.

In further support of the merit of the within appeal is the finding by the Tax Court that William Geller's use of the name "Wolf Geller" evidenced concealment and fraud.(A. 40-41) The finding is clearly erroneous. Wolf Geller was another rightful name of William Geller. It was used because it was a convenient way to carry an account so that everyone, including

the Commissioner , would know that the money or bonds therein were segregated and did not belong to "William Geller," but to others.

The Judge of the Tax Court found that William Geller's own brother, Solomon, had always known him as "Welvel," thus proving beyond a doubt that "Wolf" was a fabrication, or at least a device, of petitioners for the purpose of committing fraud. (A.35)

The Judge would have done better not to go outside the record. "Welvel" means "Little Wolf." It is the diminutive form of Wolf, used by members of the family for someone whose name is Wolf. It proves just the opposite of what the Judge intended it to; from his earliest days, William Geller's name was Wolf Geller.

Beyond this blunder, the suggestion implicit in the finding of fraud is patently unreasonable. No one with any sense of reality who was named "William Geller" would try to deceive the Commissioner of Internal Revenue by using the name "Wolf Geller." W. Geller is W. Geller; under other circumstances, petitioners submit with the utmost respect that it would be ludicrous for the suggestion to be made that William Geller was using Wolf Geller as an alias on a brokerage account. That Wolf Geller was as much the name of Dr. Geller as William Geller makes the finding nothing short of an embarrassment. The decision should be reversed.

In support of its finding, the Tax Court cited the case of Estate of Dorothy E. Beck, supra, at 366. That case involved nominee accounts which used the identities of other persons, and names which were entirely different from that of the Becks. If the Tax Court, or the Commissioner, knows of a case in which a finding of fraud was based on an alias along the lines of "Wolf Geller" when "William Geller" was the taxpayer's professional name, neither the court nor the Commissioner has cited it.

Petitioner, however, will cite a case in which the Commissioner attempted to do what he attempted in this case, but with less success:

"There is no support in the evidence for respondent's assumption that any of the bank accounts were 'concealed' of 'hidden.' All were openly maintained either in [taxpayer's] own name or the joint name of him and his wife." Estate of Edward E. McLean, 26 TCM 201,206 (1967)

In a related matter, the Tax Court was convinced from the first minutes of the hearing that William Geller perjured himself when he stated, in the Petition, "I, William Geller, am not Wolf Geller." The Judge was relentless in pressing the point(A.94) and repeated it in his opinion (A.34). The allegation betrays an absence of perspective, and the prejudice to petitioners' case was great.

By June of 1973 Morris Geller was dead. The filings of 1965 and 1966, in which petitioners did not hesitate to disclose every fact about the corporation, were done when Morris Geller was alive. Seven years after the 1965 return was filed the Commissioner acted. If William Geller chose to demand that the Commissioner prove every element of his case, it would have been understandable.

The statement in the Petition, however, was not the denial that the Tax Court claimed it was. It was a statement that "Wolf Geller" was a nominee account for assets that should not have been confused with the true assets of William Geller.[10] The explantion is not only plausible; it could not be otherwise. William Geller signed the checks that were deposited into the brokerage account with both the names "William Geller" and "Wolf Geller," hardly the mark of someone with something to conceal. Besides, William Geller's experience with the Commissioner was extensive; he need only have read the notice of deficiency (A.3) as a certain indication that the Commissioner was referring to the "Wolf Geller" account that he had opened at Merrill Lynch.

In addition to being implausible, basing the finding of fraud upon a statement in the Petition herein is without precedent. While statements made in the course of the Commissioner's investigation have been held to be evidentiary of fraud, a

---

10. Cf. Walter E. Bevan, 30 TCM 1337, 1344: "We think, however, that Walter's objective was not to defraud the Government by hiding this deposit but rather was to segregate it from his other assets since, at least to some extent, it represented a long-term accumulation of savings."

statement in a petition comes after the determination of deficiency has been made. As such, fraud may not be established by a pleading, or its equivalent, and certainly not when the statement is, at worst, ambiguous.

When considered in context, the Tax Court's fixation with the statement in the Petition poisoned the hearing from its outset, and ultimately got the better of the lower court's judgment. As petitioners have attempted to show throughout this brief, the errors committed by the lower court were unusual in both degree and number. The "Wolf Geller" factor may explain the phenomenon.

Two other indicia of fraud, as found by the Tax Court, make it clear that the court found fraud only after assuming that the deposits were income to petitioners. If the deposits were not income derived from the corporation it could not possibly have been wrong for petitioners to fail to keep books and records of their receipt (A. 41) for there was nothing to keep books and records of. The corporation's books and records were complete enough to provide an accountant with the material to file accurate tax returns; that the outflow of the corporate assets should not have been evidenced by records or signed receipts is both consistent with petitioners' explanation of their relationship to the principals [11/], and is not an impropriety. If the Tax Court was referring to the corporate,

11. Cf. Johnny G. George, 29 TCM 989, 997 (1970)

rather than personal, records, the Commissioner is obliged to show, first, that petitioners had sufficient knowledge as to recipients to keep detailed books and records of that kind (see below), and, second, that those particular books and records were "necessary to the preparation of honest and accurate returns," (Estate of Dorothey Beck, supra, at 366) without which fraud cannot be posited upon a failure to keep adequate books and records. (See also Goldberg v. C.I.R., supra, at 320)

Similarly, William Geller's statement in 1968 that he did not know what had happened to the corporate assets was accepted by the Judge, at the hearing, as consistent with his testimony. (A. 75-77) William Geller's suspicions as to his brother were strong and well-founded, but it was not shown that he was asked questions which called upon him to target his brother as the true recipient. Even if had been asked, evasiveness in the context of the family and business relationships that comprise petitioners' explanation would be predictable, and surely not evidentiary of any form or degree of fraud relevant to this case.

CONCLUSION

In view of the foregoing, petitioners-appellants urge this Court to find that the Commissioner prevailed in the TaxCourt by virtue of avoiding the investigation of leads which would have helped petitioners-appellants and by being required merely to support a presumption of correctness in his favor rather that to prove by clear and convincing evidence that petitioners-appellants received income in the years in question. In both respects, the Tax Court failed to apply the proper standard. Because the Commissioner failed to prove fraud or the elements of fraud, especially when the significant inconsistencies and contradictions in the record are considered, the decision of the Tax Court should be reversed, with direction to enter decision for petitioners, on the grounds that the limitations period in the Code bars the assessments herein and that the failure of the Commissioner to discharge his investigative duty requires that decision be entered for petitioners.

Respectfully submitted,

Irwin Geller

Irwin Geller
Counsel to petitioners-appellants

APPENDIX

Internal Revenue Code (26 U.S.C.):

Section 6501(a)--GENERAL RULE--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed*** and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

Section 6501(c)(1)--EXCEPTIONS- FALSE RETURN--In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time****

Section 7454(a)--FRAUD--In any proceeding involving the issue of whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary.

Tax Court Rule 142--(a) The Burden of proof shall be upon the petitioner, except as otherwise provided by statute or determinted by the Court;****

(b) FRAUD. In any case involving the issue of fraud with intent to evade tax, the burden of proof in respect of that issue is on the respondent, and that burden of proof is to be carried by clear and convincing evidence****

CERTIFICATE OF SERVICE

The undersigned, an attorney admitted to practice before the United States Court of Appeals for the Second Circuit, does hereby affirm under the penalties of perjury that on the 6th day of January, 1977 he mailed 2 copies of the within brief of petitioners-appellants and 2 copies of the appendix by first-class mail to the attorney for respondent-appellee, as follows:

Scott P. Crampton
Assistant Attorney General, Tax Division
United States Department of Justice
Washington, D.C. 20530

Irwin Geller

Irwin Geller

Dated: New York, New York
January 6, 1977